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HB 94

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HOUSE NATURAL RESOURCES COMMITTEE
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TESTIMONY IN SUPPORT OF HB 94

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Introduction

Mr. Chairman and members of the committee, my name is John Arrigo. I am administrator of the DEQ Enforcement Division and I am here to testify in support of HB 94. I would first like to thank Rep. Van Dyk for sponsoring this bill. HB 94 amends the Underground Storage Tank Act to address an oversight from legislation that was passed last Session and to correct some internal inconsistencies that were identified when the bill was drafted.

If you refer to the handout which includes some existing law that is not shown in HB 94, it will be easier to understand the bill. Last Session the Legislature passed HB 429, which standardized penalty calculation factors in 16 different environmental laws administered by DEQ. HB 429 created 75-5-1001 and inserted it into the UST law at 75-11-525(1)(b) - highlighted in the handout. The new penalty factors in Section 75-5-1001 shown on the bottom of the handout are: nature, extent, gravity, circumstances, history, economic benefit, good faith and cooperation, amounts voluntarily expended and other matters as justice may require. Rules have been passed to implement the new standard penalty calculation process and the system is working very well.

The handout also highlights the existing penalty factors in Section 75-11-525(4) of the UST law that duplicate the new factors in 75-1-1001. These existing factors should have been repealed by HB 429 in the last Session but this section was missed in the bill drafting. Section 2 of HB 94, on page 3 lines 16-22 repeals the old, duplicative penalty factors in 75-11-525(4).

HB 94 also fixes some internal inconsistencies that were discovered during drafting. If you refer to Section 75-11-512 on the back side of the handout, this is the portion of the UST law that authorizes the DEQ to issue corrective action orders, in contrast to 75-11-525, which authorizes administrative penalty orders. Under 75-11-512, service of a corrective action order is complete upon mailing and these orders may be appealed to the Board of Environmental Review. Section 75-11-525 conflicts because it states that service of a penalty order is effective upon receipt and appeals are submitted to the Department.

Because many of our administrative orders require corrective action and assess a penalty, the method of service of the order must be consistent. We mail all of our orders certified return receipt requested and most are received and signed for. If a violator chooses not to receive certified mail from the Department, service of the order would not be complete. In these rare instances, DEQ hires the sheriff or a process server to serve the order. However, DEQ prefers that service be complete upon the date of mailing to eliminate the excuse that someone did not receive our mail. Section 2 of HB 94, on page 2, line 19 amends 75-11-525 by repealing "receipt" and inserting "mailing."

However, Mr. Chairman some of the interested parties have expressed a desire to retain receipt as the method of service and want 75-11-512 amended to make service of corrective action orders complete upon receipt. The Department does not have any problem with this suggestion and with the Sponsor's permission I could have an amendment prepared for executive action.

In the matter of appeals, because the Department issues the orders, we do not want to hear the appeals. Over the past DEQ has tried to change all the laws to move appeals to the Board, however we overlooked this appeal process in the UST law. Therefore, amendments proposed in Section 2 on the top of page 3, lines 2 and 3 of the bill change the appeal of penalty orders to the Board of Environmental Review to be consistent with 75-11-512. The remaining striking on the top of page 3 eliminates duplication of the first part of 75-11-525(2).

Another item that is amended out of the UST law by HB 94 is a schedule or rules listing maximum and minimum penalties for specific violations. DEQ currently has rules that list maximum and minimum penalties for specific violations. These rules are out of date because they do not list all the possible specific violations and the penalty schedule was not calculated using the new penalty factors. Also, some of the new penalty factors, such as good faith and cooperation, are directly related to the behavior of the individual violator. We cannot predetermine whether a violator acted in good faith, calculate a penalty and publish it in rules, prior to the violation occurring. We prefer to do what the law requires and use the new penalty factors to calculate a penalty that is specific to the violation and the behavior of the violator.

To address this difficulty, HB 94 strikes language that refers to a penalty schedule on page 3, line 16, and from the rulemaking authority listed in Section 1, on page 1, line 30. We still retain the authority to suspend a portion of the penalty pending correction of the violation in Section 75-11-525(2)(d).

Mr. Chairman, this concludes my testimony on HB 94 and I will remain available for questions.

HB 94 - Amend Underground Storage Tank Act penalty factors Background Information

John Arrigo, DEQ Enforcement Division - January 2007

75-11-525. Administrative penalties for violations -- appeals -- venue. (1) (a) A person who violates any of the provisions of this part or any rules promulgated under the authority of this part may be assessed and ordered by the department to pay an administrative penalty not to exceed $500 for each violation. This limitation on administrative penalties applies only to penalties assessed under this section. Each occurrence of the violation and each day that it remains uncorrected constitutes a separate violation. The department may suspend a portion of the administrative penalty assessed under this section if the condition that caused the assessment of the penalty is corrected within a specified time. Assessment of an administrative penalty under this section may be made in conjunction with any order or other administrative action authorized by this chapter.

(b) Penalties assessed under this subsection (1) must be determined in accordance with the penalty factors in 75-1-1001.

(4) The department shall publish a schedule of maximum and minimum penalties for specific violations. In determining appropriate penalties for violations, the department shall consider the gravity of the violations and the potential for significant harm to the public health or the environment. In determining the appropriate amount of penalty, if any, to be suspended upon correction of the condition that caused the penalty assessment, the department shall consider the cooperation and the degree of care exercised by the person assessed the penalty, how expeditiously the violation was corrected, and whether significant harm resulted to the public health or the environment from the violation.

75-1-1001 (2005 - HB 429). (Effective January 1, 2006) Penalty factors. (1) In determining the amount of an administrative or civil penalty, the department of environmental quality or the district court, as appropriate, shall take into account the following factors:

(a) the nature, extent, and gravity of the violation;

(b) the circumstances of the violation;

(c) the violator's prior history of any violation, which:

(i) must be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed;

(ii) must be documented in an administrative order or a judicial order or judgment issued within 3 years prior to the date of the occurrence of the violation for which the penalty is being assessed; and

(iii) may not, at the time that the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review;

(d) the economic benefit or savings resulting from the violator's action;

(e) the violator's good faith and cooperation;

(f) the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation; and

(g) other matters that justice may require.

HB 94 - Background Information

75-11-512. Administrative enforcement. (1) When the department believes that a violation of this part or a rule adopted under this part has occurred, it may serve written notice of the violation personally or by certified mail on the alleged violator or the violator's agent. The notice must specify the provision of this part or the rule alleged to be violated and the facts alleged to constitute a violation and may include an order to take necessary corrective action within a reasonable period of time stated in the order. The order becomes final unless, within 30 days after the notice is served, the person named requests, in writing, a hearing before the board. On receipt of the request, the board shall schedule a hearing. Service by mail is complete on the date of mailing.

(2) If, after a hearing held under subsection (1), the board finds that a violation has occurred, it shall either affirm or modify the department's order. An order issued by the department or by the board may prescribe the date by which the violation must cease and may prescribe time limits for particular action. If, after hearing, the board finds that a violation has not occurred, it shall rescind the department's order.

(3) In addition to or instead of issuing an order pursuant to subsection (1), the department may:

(a) require the alleged violator to appear before the board or department, by subpoena or subpoena duces tecum, for a hearing at a time and place specified in the notice to answer the charges complained of or to provide information regarding the alleged violation or its actual or potential impact on the public health and welfare or the environment;

(b) initiate action under 75-11-513, 75-11-514, or 75-11-516; or

(c) assess administrative penalties and issue corrective action orders under 75-11-525.

(4) In the case of disobedience of any subpoena issued and served under this section or of the refusal of any witness to testify as to any material matter with regard to which the witness may be interrogated in a hearing or investigation before the board or the department, the board or department may apply to any district court in the state for an order to compel compliance with the subpoena or the giving of testimony. The court shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unjustified, the court shall enter an order requiring compliance. Disobedience of the order is punishable by contempt of court in the same manner and by the same procedures as is provided for like conduct committed in the course of civil actions in district court.

(5) If a person fails to comply with an order issued pursuant to subsection (1) or (3) within the time allowed in the order, the department may enter the property on which the underground storage tank that is in violation is located and temporarily close the tank. If the department finds that permanent closure is necessary to prevent substantial environmental harm or because the owner or operator is unlikely to comply with the order, it may permanently close the tank.

(6) This section does not prevent the board or department from making efforts to obtain voluntary compliance through warning, conference, or any other appropriate means.